Nos. 117, 118, 119, 332, 333, 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

The Denver & Rio Grande Western Railroad Company, Appellant,

v.

Union Pacific Railroad Company, et al.

No. 118

Union Pacific Railroad Company, et al., Appellants,

v.

United States of America, and Interstate Commerce Commission.

No. 119

United States of America, Interstate Commerce Commission, and Secretary of Agriculture, Appellants,

v.

Union Pacific Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

Washington Public Service Commission, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 333

Union Pacific Railroad Company, et al., Appellants,

v.

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No. 334

United States of America and Interstate Commerce Commission, Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

SUPPLEMENTAL MEMORANDUM FOR UNION PACIFIC RAILROAD COMPANY, ET AL., WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

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SUPPLEMENTAL MEMORANDUM FOR UNION PACIFIC RAILROAD COMPANY, ET AL., WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

This Supplemental Memorandum is filed pursuant to suggestions of the Court made during the oral arguments April 23rd and 24th that additional information be furnished the Court concerning certain questions and particularly the question whether the tariffs published in 1906 to 1912 cancelled the through routes previously published in connection with the Rio Grande via Utah gateways and the Union Pacific; whether the tariffs publishing joint rates for the involved traffic when the Rio Grande filed its complaint with the Commission August 1, 1949, published any provisions concerning through routes in connection with the Rio Grande, and whether the tariffs publishing local rates of the Union Pacific publish any notice, statement or "holding out" of through routes or through service by the Union Pacific in connection with the Rio Grande at the combination or sum of the local rates.

In approaching the through routes question and the Rio Grande's contention that through routes for the traffic concerned now exist and for many years have existed via its line, the following facts and circumstances should be kept in mind:

Although the Rio Grande's complaint to the Commission alleged (Vol. I, p. 6) that "through routes now exist and have for many years existed for the interchange of traffic by complainant [Rio Grande] with the Union Pacific" at points in Utah and with the Union Pacific

and certain other defendants at Denver and other points in Colorado, the Rio Grande did not allege and has never attempted to state or show by evidence or otherwise what through routes it contended to be in existence via its line for the involved traffic from and to the northwest nor what the termini of the claimed through routes are, or for what commodities the through routes are claimed to exist or what carriers comprise the claimed through routes for the traffic it seeks to divert for a "bridge" haul over its line between points in the northwest area and points in the eastern and southern parts of the country; nor did the Colorado court indicate what through routes between what termini for what commodities or what carriers form the through routes it held to be in existence in connection with the Rio Grande (Colo. R. Nos. 332, 333 and 334, page 292). In short, the Rio Grande and the Colorado court both claim that through routes are in existence via the Rio Grande's line for the traffic concerned but apparently base their conclusion solely on the fact that traffic can be physically interchanged between the Union Pacific and the Rio Grande at Ogden and at Denver, and from that fact they erroneously conclude that the Rio Grande automatically becomes a part of all or some unnamed and unspecified through routes out of the millions of routes that exist for the transcontinental traffic moving between the 2,900 stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country (see brief of Union Pacific and other railroads in No. 333, pp. 53-86).

Since a through route is necessarily definitely and specifically described or determinable from tariffs by naming its termini, the commodity or commodities for which it exists, the connecting carriers which form the

through route, it is and would be impossible for the Union Pacific and other railroads, or for the Commission to give practical application to the contention of the Rio Grande and the holding of the Colorado court that unnamed, unspecified and undescribed through routes are in existence between the Union Pacific and the Rio Grande for the traffic concerned.

WHETHER OR NOT THROUGH ROUTES FOR THE INVOLVED TRAFFIC WERE ALREADY IN EXISTENCE VIA THE RIO GRANDE IS A MOOT QUESTION WHICH HAS NO BEARING UPON THE VALIDITY OF THE ORDER ISSUED BY THE COMMISSION.

Although the Rio Grande has argued on brief and orally to this Court that the question whether through routes were already in existence via its line for the involved traffic is "crucial" to the decision to be made in this case, and the Colorado court held that the Commission's finding that the through routes claimed by the Rio Grande were not already in existence via its line "obviously prejudiced the entire proceeding" before the Commission (Colo. R. 288), neither the Rio Grande nor the Colorado court indicates how or in what manner the Commission's finding on the through routes question is now relevant or in what manner that finding prejudiced the Rio Grande.

The Rio Grande, of course, claimed that through routes already existed via its line for the involved traffic in the hope of avoiding the short-haul restriction upon the Commission's authority to order an additional through route which short hauls existing through routes, and its pursuit of that question through the Colorado court and before this Court clearly is for the purpose of forcing

the case back upon the Commission, insofar as it failed to grant the full demands, in the further hope of obtaining the financial benefit of joint rates on still other commodities, while precluding the Commission from reconsidering that part of the "prejudiced" proceedings which gives the Rio Grande the financial gain the order confers.

We submit that all of the talk both in briefs and in the oral arguments concerning the question whether the five-to-five decision of the Commission was a "clear-cut" holding that through routes already exist via the Rio Grande for the involved traffic, and the discussion as to whether such routes did exist in fact or in law, is idle and futile, because, for the reasons set forth at pages 36-38 of the brief of Washington Public Service Commission, et al., No. 332, and at pages 87-98 of the brief of Union Pacific Railroad Company, et al., No. 333, the question whether through routes already existed via the Rio Grande became and has been moot, since the Commission, although finding that through routes via the Rio Grande were not in existence, nevertheless found that they were necessary in the public interest to provide adequate and more economic transportation.

With the latter finding, the short-haul prohibition of Section 15(4) became impotent and was no longer an obstacle to the Commission's ordering the joint rates demanded by the Rio Grande to the extent they were justified by the evidence. This is indisputable for the reason that as argued at page 17 of the brief filed in this Court by The American Short Line Railroad Association in Nos. 332, 333 and 334, "the mere finding that through routes existed, as was alleged by the Rio Grande in its complaint to the Commission, would not grant the relief" sought by the Rio Grande, because "it is the level of

rates which is the impediment to full utilization of the routes." Contrary to the contention there made, the "degree this impediment is to be removed" is a question already answered by the Commission by its finding that joint rates via the Rio Grande equal to those maintained over Union Pacific routes were necessary in the public interest, but, upon the showing made by the evidence, only for the articles named in the order.

Having eliminated the obstacle of the short-haul prohibition by its finding that through routes via the Rio Grande were necessary in the public interest, the Commission then had only the problem of determining for what commodities the evidence showed joint rates to be necessary in the public interest. Having given full effect to the evidence by its finding that public interest required joint rates only on the commodities named in the order, the Commission has exhausted the so-called "relief" it could grant the Rio Grande. Obviously, it would have benefited the Rio Grande none at all if the Commission had found that through routes were in existence via the Rio Grande for all commodities—but that the evidence failed to show that public interest required equal joint rates on any commodity.

The impotency and "straw-man" nature of the question whether through routes already existed via the Rio Grande for the involved traffic is sharply demonstrated by the fact that the Chief Examiner found in his proposed report (sheet 5) the routes did not exist but were necessary in the public interest for all commodities, and by the fact that Commissioner Patterson held that in his view the evidence justified joint rates on "lumber and articles taking lumber rates" and that those articles should also be included in the order, whereas Commissioner Arpaia held that through routes were already in exis-

tence via the Rio Grande for the involved traffic but that the evidence of public interest warranted joint rates "only" on the commodities for which relief is included in the majority report" (Nebr. R. Nos. 117, 118, 119, pp. 78-79).

Therefore even if the case be remanded to the Commission as ordered by the Colorado court, or upon decision of this Court holding that through routes were already in existence via the Rio Grande for the involved traffic, such remand could not direct the Commission to abandon its exclusive administrative function of appraising the extent to which the evidence of public interest requires joint rates. Thus, such remand would be futile since the Commission has already determined that the evidence justifies joint rates in the public interest only for the commodities named in its order.

However, if this Court should disagree with the foregoing views, it still could not, or should not, reach the question whether through routes via the Rio Grande already exist unless and until it has considered and overruled the contentions in our opening briefs in the Colorado case:

(1) That the Commission's *failure* to compel through routes and joint rates for commodities not named in the order is neither an "order" nor a part of the order issued and therefore there is no jurisdictional basis for the Colorado court's action, and,

(2) That, as the Rio Grande has no semblance of a legal right to the traffic it seeks to divert to its line, it was without standing or legal right to maintain its suit in the Colorado court.

These contentions are discussed, respectively, at pages 31 and 18 of the brief of Washington Public Service Com-

mission, et al., No. 332, and at pages 27 and 35 of the brief of Union Pacific Railroad Company, et al., No. 333.

THE THROUGH ROUTES ESTABLISHED IN CONNECTION WITH THE RIO GRANDE IN 1897 DURING THE RECEIVERSHIPS WERE EXPLICITLY CANCELLED BY TARIFFS PUBLISHED AFTER THE RECEIVERSHIPS ENDED.

The history of through routes and joint rates, which existed for a short period more than 50 years ago, in connection with the Rio Grande for through traffic between the northwest area and the eastern part of the country is short and simple:

Having invested hundreds of millions of dollars during the 1870's in constructing and acquiring lines in the northwest to develop and serve that area, the Union Pacific, desiring to protect and retain its long haul to and from the Missouri River on traffic from and to the northwest, refused to establish through routes and joint rates with the Rio Grande for that traffic.

Union Pacific lost control in 1897, through separate receiverships of its lines and those of its northwest subsidiaries, the Oregon Short Line Railroad and Oregon-Washington Railroad & Navigation Company. In that year, the Short Line and the Navigation Company established through routes and joint rates with the Rio Grande via Utah gateways for traffic betwen the northwest and the east. (Neb. R. Nos. 117, 118, 119, p. 35.)

When the Union Pacific regained control after the receiverships ended, it proceeded with a program to regain and safeguard its long haul on the traffic originated and terminated on its lines in the northwest. This it accomplished by publishing tariffs which *eliminated* the Rio

Grande from the through routes by *cancelling* parts of some of the old tariffs and by issuing new tariffs in which the Rio Grande was *omitted* from the through routes over which joint rates were applicable.

At the hearings before the Commission in the instant case the Rio Grande's traffic witness Earley cited the new tariffs (thus making them a part of the record before the Commission) which cancelled and superseded the old tariffs in which through routes had been established in connection with the Rio Grande. He stated that the new tariffs cancelled joint rates via the Rio Grande (Vol. I, 87-88), but neglected to state the fact that what actually and in reality was accomplished by the new tariffs was the *elimination* of the Rio Grande as part of the through routes over which the joint rates would apply. This was done by issuing new tariffs cancelling the parts of the old tariffs that named the Rio Grande as a part of the through routes over which joint rates would thereafter be applicable.

The Rio Grande now erroneously argues at this late date that the new tariffs cancelled the joint rates but did not cancel or close the through routes, or, in other words, that the new tariffs accomplished exactly the reverse of what they intended, and quite clearly and undeniably accomplished.

Cancellation of old through routes via Rio Grande

Pursuant to the Court's permission to file a memorandum covering this history of the through routes and joint rates via Utah gateways in connection with the Rio Grande, there is attached hereto as Appendix A, a sworn statement personally prepared by A. J. Stilling, Assistant Freight Traffic Manager, with 39 years experience in

freight tariff and traffic work with the Union Pacific. His statement quotes the pertinent parts of the tariffs cited by witness Earley in the record before the Commission, and the quotations show beyond dispute that the tariffs published by Union Pacific in 1906 and 1912 quite explicitly *cancelled* the old through routes with the Rio Grande.

The excerpts quoted by Mr. Stilling from the tariffs of 1906 and 1912 cited by Witness Earley expressly show:

(1) "CANCELLATION" notice was issued, effective August 25, 1906, to "CANCEL representation of the * * * Denver and Rio Grande R. R. from title page of tariff", I. C. C. No. 1970, which had published the Rio Grande as a participating carrier in the through routes over which the joint rates applied.

(2) That I. C. C. tariff No. 1583 which published specific routes via Utah junctions with the Rio Grande was cancelled in full by notice effective November 24, 1906, published in tariff I. C. C. No. 1976, stating that "U. P. I. C. C. No. 1976 Supersedes I. C. C. No. 1583." The new tariff, I. C. C. No. 1976, *omitted* all through routes over Union Pacific via Utah junctions with the Rio Grande which had been advertised or held out to the public in the previous tariff, I. C. C. No. 1583, thus, eliminating the Rio Grande and closing the through routes previously offered shippers in connection with that railroad.

(3) That Westbound Tariff I. C. C. No. 942 which published through routes via Denver and other Colorado gateways in connection with the Rio Grande and other named railroads, through Salt Lake City, Huntington

and Portland, Oregon, and other northwestern gateways, in connection with the Union Pacific, Oregon Short Line, Oregon-Washington Railroad & Navigation Company, was amended by Supplement No. 12, thereto, effective November 4, 1912—

"by ELIMINATING Gateways 43 D, 44, 45, 46 and 47 (and all references thereto shown in the tariff), reading as follows:"

Then follows the paragraphs quoted in Mr. Stilling's memorandum, pages 3-5, under "No. 3", in which the gateways and railroads via which through routes were "ELIMINATED" are specified by name. In each paragraph under each of the numbered "gateways" the "Denver & Rio Grande RR" is "ELIMINATED". These included all routes that existed via Utah junctions in connection with the Rio Grande and with the elimination of through routes via those gateways in connection with the Rio Grande the routes were closed and the Rio Grande ceased to be a part of the through routes that previously existed.

(4). Through routes via Utah gateways in connection with the Rio Grande and other lines had been published in Eastbound Tariff 2-H, R. H. Countiss, I. C. C. No. 930, as shown in the excerpts quoted in Mr. Stilling's memorandum under "No. 4" pages 5-8. That tariff was cancelled "in full" by cancellation notice effective December 16, 1912, in Eastbound Tariff 2-I, I. C. C. No. 958, reading as follows:

"LIST OF TARIFFS CANCELLED IN FULL BY THIS TARIFF

ICC No.	Agent	Tariff	Cancellation
930	R. H. Countiss	2-H	In full"

The routes or gateways previously published in Tariff 2-H, ICC No. 930, were not brought forward or republished in Tariff 2-I, ICC 958, and were therefore cancelled effective December 16, 1912, when the Rio Grande ceased to be a part of the through routes.

In view of the foregoing indisputable facts showing the Union Pacific's repeated publication of notices in the tariffs "eliminating" the Rio Grande from the old tariffs which published through routes via its line; "cancelling" the name of the Rio Grande from the old tariffs and "superseding" the old tariffs by new tariffs that "omitted" the Rio Grande pursuant to the very purpose and declaration of the published cancellation notices, we submit that the Rio Grande's assertion at page 54 of its opening brief, and throughout this litigation that Union Pacific cancelled the joint rates with the Rio Grande in 1906 and 1912 but that "no specific action was taken to cancel the through routes"—is simply not true. The excerpts quoted from the tariffs prove that exactly the reverse is true, and that the Rio Grande's reiteration of its false contention misled the Colorado court to say "nothing was ever done to close the routes" (Colo. R. Nos. 332, 333 and 334, page 291).

Neither the Interstate Commerce Act, or any other statute, nor any decision, rule or regulation promulgated or stated, formally or informally by the Commission or the courts, specifies, prescribes or suggests what a railroad must do to cancel or close a through route. Any language sufficiently clear to be understood suffices to notify the public that a previously existing through route is "closed" for the future, and, we submit, that the language of the tariffs quoted in Mr.

Stilling's memorandum is so explicit in terms, and so clear in meaning as to preclude any rational mind from an honest belief that the language fails to serve notice that through routes with the Rio Grande are thereby "closed".

While the Rio Grande has argued to this Court that the Union Pacific could have published a "notice" in its tariffs stating that it would refuse to accept any through or "bridge" shipment tendered for movement over the Rio Grande—even at the combination or sum of the local rates—it has never even hinted that there is any law, rule or regulation requiring such action to close or cancel a through route.

Such contention is absurdly erroneous, particularly in view of:

a. Section 6 of the Act requiring railroads to publish rates between points on their respective lines.

b. Section 1(4) of the Act, which declares that: "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor."

c. Section 20(9) of the Act conferring power upon the federal courts—

> "to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Act, or any of them."

The Rio Grande's contention that to retain any protection against being short hauled under Section 15(4) the Union Pacific must violate its statutory duty to provide transportation upon "reasonable request" and its

duty under Section 20(11) to accept and issue a bill of lading for property tendered for transportation is so patently untenable as to merit neither discussion here nor consideration by the Court. (See Union Pacific brief in No. 333, pages 74-76.)

In its desperation to support its through routes contention, the Rio Grande has argued to this Court that, since Section 15(8) of the Act assures shippers the right to select their choice of routes where "two or more through routes and through rates shall have been established", it necessarily follows that through routes within the meaning of Section 15(3) and (4) already exist via its line for the involved traffic because a few shippers have elected to route some isolated shipments via its line even at the extra expense of its higher combination of local rates. But this is a clear distortion of Section 15(8), for that section does not purport to cover the myriad of situations where no through route exists. It merely prevents a carrier from depriving the shipper of his selection of the route over which he wants his traffic to move, if and where there are two or more established through routes. The rights of shippers to route their traffic where two or more through routes with through rates have not been established are not declared or covered by this section.

Section 15(8) was added to the Act in 1910 (36 Stat. 553) as a part of the expansion of Section 15 with reference to the establishment of new through routes. As an accompanying part of that expansion, Section 15(8) was clearly intended as protection to shippers in the routing of their traffic where a duplication of routes might result from the Commission's expanded authority to order additional routes, and to prevent carriers from controlling the routing for their own selfish interests.

Moreover, since there is no provision in the Act preventing a shipper from routing his traffic over any series of connecting railroads wherever physical interchange is possible and the carriers have performed their duty of publishing local rates on their respective lines, a shipper may exercise his right to route his traffic over the lines of any such connecting carriers if he is willing to pay the rates published over the route he chooses, regardless of whether the rates are combinations of local rates or joint rates. But the fact that he may do so obviously could not result in the creation of a new through route where none had been established within the meaning of the Act, for, if so, the Commission's restricted power under Section 15(3) and (4) to order through routes that short haul existing routes would be reduced to meaningless surplusage.

The language of tariffs effective when the Rio Grande filed its complaint with the I. C. C. August 1, 1949.

Since through routes via the Rio Grande for the traffic concerned were explicitly cancelled in 1906 and 1912, as shown above, the tariffs published since that time have not repeated that cancellation of the Rio Grande from the through routes for such repetition is no more necessary than it would be to repeat an obituary notice continuously after its first publication.

As pointed out in Mr. Stilling's memorandum, page 8, the joint rates apply only over the routes and through junctions of carriers published in the tariffs. As the Rio Grande has not been a part of the through routes since 1906 and 1912, the tariffs effective at the time the Rio Grande filed its complaint with the Commission and those effective at the present time do not mention the Rio Grande or any other carrier or carriers whose lines

do not form a part of the through routes over which the joint rates are applicable. In other words, the Rio Grande and other non-participating carriers are excluded from the through routes simply by omitting them from the tariffs in which the through routes over which the joint rates apply, and there can be no through routes in connection with the Rio Grande unless and until the Union Pacific republishes the routes and gateways which it cancelled in 1906 and 1912.

In addition to the complete absence of routes or gateways via Utah junctions with the Rio Grande in the present tariffs of the Trans-Continental Freight Bureau to and from the northwest area, the Union Pacific publishes the following routing prohibition as a further safeguard against being short hauled:

> *Publishing Agent W. J. Prueter's ICC No. 1563, Item 90* (Mr. Prueter is the present-day publishing agent for railroad freight rate tariffs that were issued by Agent Countiss in 1912.)
>
> "Westbound rates to points subject to the Western Gateways named herein do not apply on traffic delivered to the UP by connecting lines at junction points in the State of Utah.
>
> "Eastbound rates from points subject to the Western Gateways named herein do not apply on traffic delivered by the UP to connecting lines at junction points in the State of Utah."

Inasmuch as through routes via Utah junctions in connection with the Rio Grande were cancelled some 50 years ago, the language just quoted from the present tariff serves notice to the public that the joint rates will not apply to shipments to and from the northwest area delivered to the Union Pacific by connecting lines and

shipments delivered by the Union Pacific to connecting lines at Utah junctions. The quoted tariff provisions thus safeguard the Union Pacific's haul from and to the Missouri River on traffic moving between points on its lines in the northwest area and points in the eastern part of the country.

Union Pacific tariffs publish no "offer" of through transportation in connection with the Rio Grande.

Questions from the Court during the oral arguments suggested the possible thought that after the through routes in connection with the Rio Grande were cancelled some 50 years ago the Union Pacific might have continued to "advertise" or hold out an offer of through transportation of the traffic concerned in connection with the Rio Grande at the combination or sum of the local rates. Mr. Stilling points out at page 9 of his memorandum that no tariff of the Union Pacific publishes or has published or contained any statement or provision advertising or offering to perform through transportation of the involved traffic in connection with the Rio Grande at the combination or sum of the local rates. The absence of any such offer in the Union Pacific tariffs necessarily negatives any holding out by the Union Pacific of any "course of business" in connection with the Rio Grande for the through traffic concerned.

The fact that the Union Pacific and the Rio Grande both publish rates between local points on their respective lines and that traffic can be physically interchanged between the two carriers may not be construed as a "holding out" or offer of through service or the establishment of a through route within the meaning of the Act, in view of this Court's holding in *Thompson v. United States*, 343 U. S. 549, at page 558, that:

"The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

THE ORDER IS VOID AND SHOULD BE SET ASIDE BECAUSE THE COMMISSION WAS PRECLUDED FROM ISSUING IT BY THE "FINANCIAL NEEDS" PROHIBITION OF SECTION 15(4) OF THE INTERSTATE COMMERCE ACT.

This is the first ground upon which the railroads and the five States contend that the Commission's order is void and should be set aside. The contention is thoroughly discussed at pages 42-51 of the brief of the Union Pacific and other railroads and at pages 55-60 of the brief of Washington Public Service Commission, et al., both in No. 118. The crucial significance of this contention was quickly recognized by Mr. Justice Frankfurter at the oral arguments. We venture to refer again to this contention since its acceptance by the Court would dispose of this entire litigation.

Motion was made to the Commission to dismiss the Rio Grande's complaint on the ground that its case was a "financial needs" case and the so-called "relief" demanded by that perenially bankrupt railroad could not be granted in view of the "financial needs" prohibition in Section 15(4) of the Act. The Commission denied the motion, saying that in reaching its conclusions, "no con-

sideration has been given to the financial needs" of the Rio Grande (Nebr. R. 34). At the oral argument before this Court counsel for the Government also denied that this is a "financial needs" case, saying that the record does not contain sufficiently complete financial data on which a financial needs determination could be made.

In making that statement, Government counsel undoubtedly overlooked the testimony of the Rio Grande's own President (Vol. I, 48-50) that its sole purpose in filing the complaint with the Commission was to improve its financial condition; the testimony of its Vice President Hogue (Vol. I, 69) that the decline in traffic along the Rio Grande Railroad forced it to turn to "bridge" traffic and that in no other way could it have "survived;" and the testimony of the Rio Grande's Freight Traffic Manager, Witness Earley (Vol. I, 81-82) emphasizing the financial importance to the Rio Grande of overhead or "bridge" traffic, and reciting at pages 89-90, the almost continuous bankruptcy of the Rio Grande for the last several decades.

The Commission emphasizes early in its report the passing of the Rio Grande "through various hands and receiverships" and its almost continuous bankrupt condition until its last reorganization was completed April 11, 1947 (Nebr. R. 34, 36). In addition to the testimony of record referred to in our opening briefs and just mentioned above, the Rio Grande's tragic financial history is, as suggested by Mr. Justice Frankfurter at the oral arguments, a matter of public knowledge, and of particular knowledge to the Commission and to this Court. See *Reconstruction Finance Corp. v. Denver & R. G. W. R. Co.*, 328 U. S. 495; *Denver & Rio Grande Investigation*, 113 I. C. C. 75; *Commercial Club, Salt Lake*

City v. A., T. & S. F. Ry. Co., 19 I. C. C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486; *Livestock-Western District Rates*, 176 I. C. C. 1, 98, and 190 I. C. C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 663.

The "financial needs" prohibition was added to Section 15(4) by the Transportation Act of 1940, 54 Stat. 911-912, 49 U. S. C. § 15(4), to stop the Commission once and for all from attempting to use its through routes powers to divert traffic from the trunk line railroads for the financial benefit and maintenance of impecunious short lines, for which purpose the Commission had continuously sought to use its through routes power. See *United States v. Mo. Pac. R. Co.*, 278 U. S. 269; *Thompson v. United States*, 343 U. S. 549, 555-556, and numerous footnotes in that opinion concerning the purpose and legislative history of the short-haul prohibition of Section 15(4) as amended.

It is no answer to say, as the Rio Grande and counsel for the Government said in the oral arguments, that the Rio Grande is not presently in financial distress or in need of financial aid through the diversion of traffic from other railroads, for obviously, as the financial needs prohibition prevents the Commission from diverting traffic from other lines to aid a financially distressed short line railroad, then the prohibition, *a fortiori*, precludes the Commission from using its through route powers to divert traffic from other routes to improve the financial condition of the Rio Grande in its presently solvent financial condition.

Our discussion of this contention in our opening briefs mentioned above, clearly shows that the record, the facts and all of the circumstances recited and recog-

nized in the Commission's own report plainly contradict its assertion that in issuing the order there it gave no consideration to the financial needs of the Rio Grande.

At the oral arguments, Mr. Justice Frankfurter quickly recognized the compelling significance of the "financial needs" contention and remarked that the financial needs prohibition seemed to be rather crucial to this controversy. We think it is crucial and decisive of the invalidity of the Commission's order, and we submit that this Court should hold that because the order is prohibited by the "financial needs prohibition" of Section 15(4), this Court should set it aside and end its consideration of the entire litigation right there.

ADEQUACY, EFFICIENCY AND ECONOMY OF UNION PACIFIC ROUTES

During the oral arguments on April 23 and 24, an inquiry from the Court concerned the question whether the Commission found the Union Pacific routes "adequate" for the traffic concerned.

At page 62 of the Record in the Nebraska case (Nos. 117, 118 and 119), concerning Union Pacific routes the Commission made the following findings:

> "* * * It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.
>
> "Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the

railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line."

The majority of the three-judge Nebraska court held (Nebr. R. Nos. 117, 118, 119, page 160) that:

"There is no evidence to suport a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate."

That court further held (Nebr. R. 161-162):

"But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established."

The first Finding of Fact made by the Nebraska court (Nebr. R. 165) was as follows:

"The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points

of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

The table set forth in the Commission's report (Nebr. R. 40) shows that Union Pacific routes are from 33 to 219 miles shorter than any routes that could be made over the Rio Grande between the northwest area and principal consuming markets in the east and south. At page 71 of the Nebraska Record, the Commission finds that between the northwest area and many destinations "the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent" than present routes between the same points.

At page 65 of the Nebraska Record, the Commission stated:

"A large number of shippers and representatives of communities served by the Union Pacific, and traffic associations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commission of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock."

The Commission then found that:

"* * * Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and

satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. * * *"

As shown in our briefs filed in this Court, 120 public and shipper witnesses testified positively and affirmatively to the adequacy, efficiency and economy of the shorter, faster Union Pacific routes. In our reply brief, filed April 19, 1956, it is shown in Appendix B thereto that the Public Service Commissions of Washington, Montana and Oregon vigorously opposed the Rio Grande's complaint before the Interstate Commerce Commission; that 14 witnesses from the State of Washington testified in opposition to the Rio Grande and that no witness from that State supported its complaint; that 5 witnesses from Montana opposed the Rio Grande's complaint and no witness from that State supported it; that 13 witnesses, speaking for numerous shippers of large quantities of traffic from and to Oregon, opposed the Rio Grande's complaint and only 2 witnesses from that State supported it. In short, Appendix B to our reply brief shows that 73 witnesses from the entire northwest area vigorously opposed the Rio Grande's complaint and only 22 witnesses from that area supported it and the latter were from the southeast corner of Idaho, except 2 witnesses from northern Utah and 2 witnesses from Oregon.

Witnesses opposing the Rio Grande testified unanimously that Union Pacific routes are adequate, efficient, shorter, more direct and furnish shippers in the northwest area excellent and entirely adequate transportation services.

Among the witnesses opposing the Rio Grande was Alfred P. Graham, Traffic Manager, Boeing Airplane Co., Seattle, Washington (listed in Martindale-Hubbell Law Dictionary, Vol. II, P. 4325, as a client of the law firm of Holman, Mickelwait, Marion, Black & Perkins of Seattle). Mr. Grahams' testimony is typical and representative of the testimony of all shippers in the northwest area who opposed the Rio Grande. His testimony appears in Vol. II of the Transcript of Record at pages 937-941 and the pertinent part of it is as follows:

> "The Union Pacific's service in regard to road haul, switching, car supply, tracing and in all other related respects has been excellent. The Union Pacific has also prepared and supplied special equipped excess height cars for the movement of large airplane components such as wings fuselages, etc., which are too large to load in standard cars. We have found the Union Pacific particularly mindful and willing to assist in the special transportation problems of our company prior to, during and since the war. It has been particularly important that special equipment assigned to service between our plants move on an expeditious over-the-road schedule, coordinated with our production schedules.
>
> "We have never asked nor do we have need for joint through rates on transcontinental traffic via the Denver and Rio Grande Western in connection with the Union Pacific. The existing routes and services of the Union Pacific are entirely adequate and sufficient for our purposes. We have routed some of our cars to Seattle via [fol. 1370] the Denver and Rio Grande Western in connection with other carriers. Transit time has been two days or more longer that when routed via the Union Pacific.
>
> "The exigencies of our production require the fastest transit time possible. If the route proposed,

which would short haul the Union Pacific, were established, it is only reasonable to assume that such a situation would result in a loss of revenue to the Union Pacific. It would naturally follow that such a loss would have to be offset by an increase in rates or by savings from a curtailment of service. Either of these results would be to the definite detriment and disadvantage of my company.

* * * * *

"The Boeing Airplane Company desires to go on record in opposition to the establishment of the requested through routes and respectfully requests the Commission to take no action that would possibly impair the ability of the Union Pacific to render the service it has in the past, which is vital to our operations."

In an obvious effort to circumvent its inescapable finding from the physical and other facts of record that the Union Pacific routes are adequate to move the present volume of traffic and any additional volume that may be anticipated in the foreseeable future, the Commission said (Nebr. R. 70) that:

"While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. * * *"

But this incredible assertion follows the Commission's correct statement at page 69 of the Nebraska Record that:

"There is no contention here by complainant that the present routes of the defendants are not ade-

quate for the traffic hauled, and no finding is sought by complainant to that effect. * * *"

And that assertion embraces the Commission's erroneous view at page 69 of the Nebraska Record that it is authorized to short haul existing routes, no matter how adequate they may be, to provide "more adequate" service by ordering additional routes.

The assertion also embraces the Commission's further erroneous view that it has power to authorize "as many routes as possible" for perishable food products regardless of the adequate, efficient and economic transportation service of existing routes. Finally, the Commission's efforts to find existing Union Pacific routes indaequate for perishable food products rests upon its wholly irrational and erroneous view expressed at page 70 of the Nebraska Record that it has power to condemn Union Pacific routes as inadequate and to short haul them because they "are not available, and higher rates apply" *at points on the Rio Grande which are not served by the Union Pacific routes.*

In other words, it was only by indulging in the three clearly erroneous premises that the Commission propelled itself to the ultimate false conclusion that Union Pacific routes, though adequate and satisfactory for any commodities moving over them, were, nevertheless, unsatisfactory for perishable food commodities requiring stoppage for in transit (commercial) operations at points located exclusively on the Rio Grande.

Such reasoning is a plain distortion of the purpose of clause "(b)" of Section 15(4) of the Act which authorizes the Commission to condemn and short haul existing routes only where they can be shown to be inade-

quate, inefficient and uneconomic for traffic moving over them, and when a *proposed* route between the same termini can be shown to afford "adequate, and more efficient or more economic, transportation," than that performed by existing routes.

Such flagrant misconstruction of the Act and such clear abuse of its power to short haul existing routes is demonstrated by the legislative history of clause "(b)" quoted at page 12 of our reply brief where it is shown that the purpose of the legislation, as stated in a report of the Senate Committee, was to give shippers "the shortest, quickest and cheapest routes available," where existing routes did not meet those tests.

Counsel for the Commission was unable to support its assertion that Union Pacific routes were inadequate for the through transportation of the involved traffic, as shown by the following from the transcript of the oral arguments:

> "Mr. Ginnane: I should make it clear the Commission did not find and the Rio Grande did not contend that Union Pacific does not render good service on its routes. The Commission made no findings that Union Pacific does not render adequate service on its routes." (p. 98)
>
> "No one challenges the fact that Union Pacific, on its routes furnishes adequate transportation services. * * *" (p. 99)
>
> "Justice Frankfurter: Adequate for what?
>
> "Mr. Ginnane: Adequate for moving these commodities along the Union Pacific's routes."
>
> "Justice Black: From your standpoint, they found the U. P.'s service adequate?
>
> "Mr. Ginnane: On U. P.'s routes." (p. 100)

The testimony of Witness R. K. Bradford, Vice President of Rio Grande, fully supports the position Mr. Ginnane was compelled to take (Vol. II, p. 1161):

> "In regard to the testimony of Mr. Hanson, may we again state that at no time have we in any way questioned the capacity of the Union Pacific Railroad physically to handle the business it now handles, nor have we at any time in this case brought up for discussion the relative efficiency of the Union Pacific—Rio Grande."

INADEQUATE, INEFFICIENT AND UNECONOMIC RIO GRANDE ROUTES

As stated above, the Commission found that the Rio Grande route would add from 33 to 219 miles additional transportation to points like Omaha, Nebraska, and that between the northwest area and many of the eastern points via the Rio Grande would be from 33 to more than 50% longer than present Union Pacific routes.

The majority of the three-judge Nebraska court held (Nebr. R. 166) that transportation service via the Rio Grande:

> "* * * is inadequate and also inefficient and uneconomical".

We urge this Court's careful attention to the compelling significance of the following:

The Examiner's proposed report (which is included in the record before this Court as an original, but not printed, document) recommended at sheet 30 that the Commission make the following finding:

"The Rio Grande, like the Union Pacific, is an efficiently operated railroad and an important and essential railroad in the national transportation system. It is capable of handling efficiently over its line traffic that it may receive from its connections coming from or destined to the territories described in this proceeding. It has demonstrated its efficiency and capacity during the war period of 1942 to 1945, and during the storm period in February 1949 when it received freight, passengers, express and mail traffic diverted from the Union Pacific, when certain portions of the latter railroad's lines in Wyoming were blocked by snow storms. The record contains evidence in considerable detail about the extent and scope of that operation, which it is not necessary to review. From that evidence it is concluded that the Rio Grande has sufficient capacity to handle efficiently the additional traffic that may be routed over its line, in the event that the joint through rates sought in this proceeding are established."

The Commission rejected the recommendation and refused to make the recommended finding. Instead, the Commission found (Nebr. R. 62):

"The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and westbound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grande is 66.3 percent greater than that

of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services."

The Commission further found (Nebr. R. 70-71):

"Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recognized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra,* and *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486."

Thus, the Commission not only failed to find that the *proposed* Rio Grande route was adequate or more efficient or more economic than the shorter, faster Union Pacific routes, but refused to adopt the Examiner's recommended finding that the Rio Grande is efficiently operated and has sufficient capacity to handle efficiently additional traffic from and to the northwest that might be diverted to its line. In other words, the finding recommended by the Examiner with respect to the *proposed* Rio Grande route is an essential prerequisite to ordering that route under clause "(b)" to short haul existing routes, but the Commission refused to make the prerequisite findings, obviously because there was no evidence to support such findings, and, indeed, the Examiner's recommended finding was clearly contrary to the evidence of record.

The Commission's attempt to condemn existing routes as inadequate because they were not available at points

in territory they did not traverse or serve was stricken down by this Court in *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, holding at page 545, that it was only by "an artificial use of words" that existing routes were condemned by the Commission and that "[t]he condition in the statute is not to be trifled away."

This Court has also rejected "the Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes", *Thompson v. United States*, 343 U. S. 549, 555, citing *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

A fortiori, the Court should strike down the Commission's effort here to completely emasculate the short-hauling restriction by misconstruing it as permitting condemnation and short-hauling of the admittedly shorter, faster, efficient and adequate Union Pacific routes, by ordering the longer, slower and "more onerous" Rio Grande route, merely because of its "artificial" assertion that perishable food products require "as many routes as possible", or because Union Pacific routes and their lower rates are "not available" at points located exclusively on the Rio Grande.

CONCLUSION

The judgment of the Nebraska district court in Nos. 117 and 119, enjoining and annulling the Commission's order in part, should be affirmed and its judgment in No. 118, sustaining the validity of the order in part, should be reversed and the case remanded with direction to issue the injunction and relief prayed by the plaintiffs in that court.

The judgment of the Colorado district court, Nos. 322, 333 and 334, should be reversed and the case re-

manded to that court with direction to dismiss the complaint.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, attorney for Union Pacific Railroad Company, one of the Appellants-Appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 11th day of May, 1956, I served, on behalf of all Appellants-Appellees herein, copies of the foregoing Supplemental Memorandum on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff.
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

and with first-class postage prepaid to:

William Spire, Esq.
United States Attorney
306 Post Office Building
Omaha, Nebraska

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Neil Brooks, Esq.
Assistant General Counsel
United States Department of Agriculture
Washington 25, D. C.

4. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Frank E. Holman, Esq.
1006 Hoge Building
Seattle 4, Washington

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

and with first-class postage prepaid to:

Harry L. Welch, Esq.
730 Farm Credit Building
206 South 19th Street
Omaha 2, Nebraska

5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who

work for The Denver and Rio Grande Western R. R. Co.; National Live Stock Producers Association; Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company, Inc.; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

Lee J. Quasey, Esq.
139 N. Clark Street
Chicago 2, Illinois

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

and with first-class postage prepaid to:

Ray McGrath, Esq.
First National Bank Building
Omaha, Nebraska

6. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to;

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

ELMER B. COLLINS,
Of Counsel for Appellants-Appellees Herein.

MEMORANDUM

My name is A. J. Stilling. I am Assistant Freight Traffic Manager of the Union Pacific Railroad and my business address is 1416 Dodge Street, Omaha 2, Nebraska. I am the same A. J. Stilling who testified (Vol. I, pp. 796-865) in behalf of the Union Pacific Railroad Company in "The Denver and Rio Grande Western Railroad Company, Complainant, v. Union Pacific Railroad Company, et al., Defendants, Interstate Commerce Commission Docket No. 30297". I have now had 39 years experience in freight tariff and traffic work with the Union Pacific Railroad Company.

Mr. T. K. Earley was the chief traffic witness for the Rio Grande in the proceeding before the Commission and was at the time he testified Assistant Freight Traffic Manager of the Denver and Rio Grande Western RR. After referring to the establishment in 1897 of through routes and joint rates between the Rio Grande and the Oregon Short Line Railroad Company, Witness Earley stated (Vol. I, pages 86-88):

(1) "Ogden was continued as an open gateway until August 25, 1906, when through competitive rates between Colorado Common Points and certain Montana points on or via the OSL and the Rio Grande through Utah junctions were cancelled by Supplement No. 1 to Union Pacific Tariff No. 10340, ICC No. 1970."

(2) "Between OSL points in Idaho and Oregon, on the one hand, and Colorado Common Points and east thereof, on the other hand, the joint competitive rates via the Utah gateways with the Rio Grande were cancelled effective November 24, 1906, in UP Tariff No. 8606, ICC No. 1583."

(3) "On November 4, 1912, transcontinental rates to OWR&N points were cancelled in Supplement No. 12 to TCFB Tariff No. 4-I, Agent R. H. Countiss' ICC No. 942."

(4) "Eastbound transcontinental rates via D&RG through Utah gateways from OWR&N points were cancelled in TCFB Tariff No. 2-I, Agent R. H. Countiss' ICC No. 958, on December 16, 1912."

In the preceding four sentences Witness Earley refers to the cancellation of "through competitive rates", "joint competitive rates" and "transcontinental rates" via Ogden or Utah gateways. I have personally examined each of the tariffs and supplements referred to by Witness Earley and will show by quotation of pertinent parts of them that the through routes via Utah gateways with the Rio Grande were cancelled on the dates mentioned by him. The numbered sentences above will be dealt with separately.

No. 1

Union Pacific Tariff 10340, ICC No. 1970, contained joint rates and through routes via Utah junctions with the Rio Grande. The following cancellation notice appears in Supplement No. 1 to that tariff effective August 25, 1906:

"CANCELLATION

"CANCEL representation of the Colorado Midland Ry. and Denver and Rio Grande R. R. from title page of tariff. * * *"

This cancellation eliminated the Denver and Rio Grande Western R. R. from participation in the through routes and joint rates published in this tariff.

No. 2

Union Pacific Tariff 8606, ICC No. 1583, contained specific routes via Utah Junction points with the Rio Grande. That tariff was cancelled in full effective November 24, 1906, by Union Pacific Tariff No. 10375, ICC No. 1976. The cancellation notice reads:

"U.P. I.C.C. No. 1976 Supersedes I.C.C. No. 1583.

"U.P. G.F.O. No. 10375 Supersedes G.F.O. No. 8606."

All through routes over the Union Pacific via Utah junctions and the Rio Grande were *omitted* from the new tariff effective November 24, 1906, on which date the Rio Grande ceased to be a part of the routes over which the through rates applied.

No. 3

The following (among other things having no reference to these proceedings) appears on pages 88 and 89, Supplement 12, Trans-Continental Freight Bureau Westbound Tariff No. 4-I, Agent R. H. Countiss' ICC No. 942:

"Effective November 4, 1912 (in Supplement No. 12): AMEND pages 30 to 36, inclusive of tariff by ELIMINATING Gateways 43D, 44, 45, 46 and 47 (and all references thereto shown in tariff), reading as follows:

"43D—Union Pacific RR., or Chicago, Burlington & Quincy RR., Denver, Colo., or Chicago, Rock Island & Pacific Ry., Denver, Colorado Springs or Pueblo, Colo., in connection with Denver & Rio Grande RR., to Salt Lake City, Utah, Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington Railroad & Navigation Co. to destination;

or

Union Pacific RR., or Chicago, Burlington & Quincy RR., Denver, Colo., or Chicago, Rock Island

& Pacific Ry., Denver, Colorado Springs, or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande RR. to Salt Lake City, Utah, Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington Railroad & Navigation Co. to destination.

"44—Union Pacific RR., or Chicago, Burlington & Quincy RR. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Denver & Rio Grande RR., to Salt Lake City, Utah, Oregon Short Line RR., to Huntington, Ore., Oregon-Washington Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

or

Union Pacific RR., or Chicago, Burlington & Quincy RR., to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs, or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande RR. to Salt Lake City, Utah, Oregon Short Line RR. to Huntington, Ore., Oregon-Washington Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (lines in Oregon) to destination.

"45—Denver & Rio Grande RR. in connection with Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington Railroad & Navigation Co.

or

Colorado Midland Ry., and Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., thence Oregon-Washington RR. & Navigation Co.

"46—Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad & Navigation Co., to Portland, Ore., thence Oregon City Transportation Co. to destination.

or

Colorado Midland Ry., and Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad and Navigation Co. to Portland, Ore., thence Oregon City Tranportation Co. to destination.

"47—Denver & Rio Grande RR., in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad & Navigation Co to Portland, Ore., thence Spokane, Portland & Seattle Ry. to destination.

or

Colorado Midland Ry. and Denver & Rio Grande RR. in connection with Oregon Short Line RR., Huntington, Ore., Oregon-Washington Railroad & Navigation Co. to Portland, Ore., thence Spokane, Portland & Seattle Ry. to destination."

In Agent Countiss' Trans-Continental tariffs, the routes in the western states over which the joint rates applied were called "Gateways" or "Western Gateways". Those quoted above included all routes that were in effect via Utah gateways or junction points with the Denver & Rio Grande RR. When those routes or gateways and all reference thereto were eliminated from the tariff, the Rio Grande to Utah junctions ceased to be a part of the through routes over which the joint rates applied.

No. 4

The following routes or "Western Gateways", as they were called, via Utah junctions with the Denver & Rio Grande RR. appear on pages 23 and 24 of Trans-Continental Freight Bureau Eastbound Tariff 2-H, R. H. Countiss' ICC No. 930, which became effective October 10, 1910:

"50-E. Via Oregon & Washington RR., Oregon Railroad & Navigation Co., Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, thence Denver & Rio Grande RR. to Pueblo, Colorado Springs or Denver, Colo., in connection with Chicago, Rock Island & Pacific Ry., or Denver, Colo., in connection with Union Pacific RR.

or

Via Oregon & Washington RR., Oregon Railroad & Navigation Co., Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, thence Denver & Rio Grande RR., and Colorado Midland Ry. to Pueblo, Colorado Springs or Denver, Colo., in connection with Chicago, Rock Island & Pacific Ry. or to Denver, Colo., in connection with Union Pacific RR.

"50-F. Via Oregon & Washington RR., Oregon Railroad & Navigation Co. to Huntington, Ore., and Oregon Short Line RR. in connection with Denver & Rio Grande RR.

or

Via Oregon & Washington RR., Stockdale, Ore., Oregon Railroad & Navigation Co., Huntington, Ore., Oregon Short Line RR. and Denver & Rio Grande RR. in connection with Colorado Midland Ry.

"53-A. Via Oregon Railroad & Navigation Co. to Huntington, Ore. and Oregon Short Line RR., in connection with Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry.

"59. Via Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR., Chicago, Rock Island & Pacific Ry., Chicago, Burlington & Quincy RR., Atchison, Topeka & Santa Fe Ry., or the Missouri Pacific Ry.

"60. Via Oregon City Transportation Co. to Portland, Ore., Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR., Chicago, Rock Island & Pacific Ry., Chicago, Burlington & Quincy RR., Atchison, Topeka & Santa Fe Ry., or the Missouri Pacific Ry.

"61. Via Southern Pacific Co. (Lines in Oregon) to Portland, Ore., Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR., or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR. or Chicago, Rock Island & Pacific Ry.

"66. Via Astoria & Columbia River RR. to Portland, Ore., Oregon Railroad & Navigation Co. to Huntington, Ore., Oregon Short Line RR. to Salt Lake City, Utah, and Denver & Rio Grande RR. or Denver & Rio Grande RR. and Colorado Midland Ry. in connection with Union Pacific RR., Chicago, Rock Island & Pacific Ry., Chicago, Burlington & Quincy RR., Atchison, Topeka & Santa Fe Ry. or the Missouri Pacific Ry."

The above-mentioned TCFB Eastbound Tariff 2-H, R. H. Countiss' ICC No. 930, was cancelled "in full" effective December 16, 1912, by TCFB Eastbound Tariff 2-I, R. H. Countiss' ICC No. 958. The cancellation reads as follows:

"LIST OF TARIFFS CANCELLED IN FULL BY THIS TARIFF

ICC No.	Agent	Tariff	Cancellation
930	R. H. Countiss	2-H	In full"

The routes or western gateways shown above were not brought forward in Tariff 2-I, ICC No. 958, and were therefore cancelled effective December 16, 1912, on which date the Rio Grande from Utah junctions ceased to be a part of the through routes over which the joint rates applied.

In the tariffs effective at the time the Rio Grande filed its complaint with the I. C. C. and in those effective at the present time the joint rates apply only via routes or gateways published in the tariffs, and as the tariffs do not publish through routes or gateways via Utah junctions with the Rio Grande, there are none and can be none unless and until Union Pacific republishes routes or gateways the same as those that were cancelled in 1912 or prior thereto.

In addition to the complete absence of routes or gateways via Utah junctions with the Rio Grande in the present tariffs of the Trans-Continental Freight Bureau to and from what the Rio Grande calls the "Closed Door Territory", the Union Pacific publishes the following routing prohibition as a further safeguard against being short hauled:

> *Publishing Agent W. J. Prueter's I. C. C. No. 1563, Item 90* (Mr. Prueter is the present-day publishing agent for railroad freight rate tariffs that were issued by Agent Countiss in 1912.)
>
> "Westbound rates to points subject to the Western Gateways named herein do not apply on traffic delivered to the UP by connecting lines at junction points in the State of Utah.
>
> "Eastbound rates from points subject to the Western Gateways named herein do not apply on traffic delivered by the UP to connecting lines at junction points in the State of Utah."

No tariff of the Union Pacific publishes or has published or contained any statement or provision advertising or offering to perform through transportation of traffic between points in the northwest area and points in the eastern and southern parts of the country in connection with the Rio Grande at the combination or sum of the local rates.

A. J. STILLING
Assistant Freight Traffic Manager
Union Pacific Railroad Company
1416 Dodge St., Omaha, Nebr.

VERIFICATION

State of Nebraska }
County of Douglas } ss.

A. J. STILLING, being duly sworn, deposes and says; that he personally prepared the foregoing memorandum and knows that the contents thereof and the statements therein made are true as stated.

A. J. STILLING

Subscribed in my presence and sworn to before me, by the affiant above named, this —— day of May, 1956.

LOUIS SCHOLNICK
Notary Public

Commission expires: May 10, 1960.

No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1954

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska; Nebraska State Railway Commission, Appellants,

v.

United States of America;
Interstate Commerce Commission.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

STATEMENT AS TO JURISDICTION

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Law Briefs—OMAHA LINO-SLUG PRINTING CO—418 So. 15th St.

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In the Supreme Court of the United States

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Public Utilities Commissioner of Oregon;
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15, Revised Rules of the Supreme Court of the United States (effective July 1, 1954), appellants, Union Pacific Railroad Com-